IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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No. 74-520

ERNEST L. MONTANYE, FORMER SUPERINTENDENT OF ATTICA CORRECTIONAL FACILITY, *et al.*,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

ALVIN J. BRONSTEIN
The National Prison Project of the American Civil Liberties Union Foundation
1346 Connecticut Avenue, N. W.
Washington, D. C. 20036
Tel. (202) 331-0500

Attorney for Respondent

Of Counsel
MELVIN L. WULF
American Civil Liberties Union Foundation
22 East 40th Street
New York, N. Y. 10016

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Whether a prisoner's *pro se* complaint, which alleged that, without any minimal due process, he was disciplinarily transferred from one prison to another as punishment for violating a prison rule, and that he suffered injury as a result of the transfer, was properly dismissed without a hearing by the District Court?

STATEMENT OF THE CASE

The respondent, Rodney R. Haymes, then a prisoner at Attica, was discharged from his job as inmate law clerk in the prison law library on the morning of June 7, 1972.[1] During the afternoon of that same day, prison authorities seized from Haymes a document which he was circulating among the prisoners in a recreation yard. The writing, prepared by Haymes at the request of other prisoners and signed by 82 of them, was addressed to Judge Curtin of the United States District Court for the Western District of New York. The petition stated that the signatories were being deprived of legal assistance and their right of access to the courts because of the removal of Haymes and another prisoner from the law library.

Haymes protested the seizure of the document and two days later, on June 9, 1972,[2] he was transferred without a hearing or notice from Attica to Clinton, several hundred miles away. He continued his protest and after receiving no response, he filed an action, *pro se*, in the United States District Court for the Western District of New York,[3] complaining that his constitutional rights were violated by the seizure of the document and by his punitive transfer without due process.

[1] This statement is taken from the opinion of the Court of Appeals (A. 28-39) and from the complaint filed in the district court (A. 2-6). The petitioners' Appendix is cited throughout as (A. -).

[2] This date appears erroneously as July 9, 1972 in the printed Appendix. (A. 30) The correct date is June 9, 1972 and is reflected in the reported decision. See *Haymes v. Montanye*, 505 F.2d at 978.

[3] The District Court and the Court of Appeals treated the complaint as an action under the Civil Rights Act, 42 U.S.C. § 1983. (A. 24, 31 n. 3)

Without holding a hearing, and after receiving affidavits solely related to the seized document issue, the District Court dismissed the complaint saying as to the transfer issue, "Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at Green Haven [sic] are harsher or substantially different from those afforded petitioner at Attica." (A. 26)

The Court of Appeals, deciding that the District Court must have granted summary judgment, rather than a motion to dismiss, because affidavits were considered,[4] reversed and remanded to the District Court for a hearing on what it considered were two controverted issues of material fact: whether Haymes was transferred as punishment for violating prison rules, and whether the effects of the transfer were sufficiently harsh to make denial of a hearing a violation of due process. (A. 31, 32).

SUMMARY OF ARGUMENT

I. The Court of Appeals, although erroneously characterizing the District Court's decision as summary judgement, was correct in implying that the allegations of a complaint must be taken as true for the purpose of

[4] As we point out in Section I, *infra*, we believe that although the Court of Appeals erroneously characterized the District Court's action as summary judgement, they reached the correct result.

a motion to dismiss for failure to state a claim. The District Court dismissed the complaint, without a hearing, and without either assuming the allegations of the complaint to be true, or reading the complaint in the light most favorable to the plaintiff. *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947); *Scheuer v. Rhodes*, ____ U.S. ____, 94 S. Ct. 1683, 1686 (1974). Upon appeal from a motion to dismiss, the facts alleged in the complaint are also to be taken as true. *Cooper v. Pate*, 378 U.S. 546 (1964) (*per curiam*).

II. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). Where the complaint was drafted and filed by a prisoner, *pro se*, it is held to less stringent standards than those drafted by lawyers, and the prisoner should be given every opportunity to offer proof in support of his allegations. *Haines v. Kerner*, 404 U.S. 519 (1971). Because the District Court heard no evidence on the motive for the respondent's transfer or on the injury suffered as a result of the transfer, this Court should remand the case to the District Court for an evidentiary hearing. *Haines v. Kerner*, 404 U.S. at 521.

III. Due process is a flexible concept and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Punitive involuntary transfers abridge interests of real substance and are sufficiently embraced within Fourteenth Amendment "liberty" to entitle a prisoner to procedural due process. *Wolff v. McDonnell*, 418 U.S. 539 (1974). This Court has rejected the

right/privilege distinction, *Morrissey v. Brewer, supra* at 481, and where a prisoner suffers grievous loss as a result of arbitrary government action, he is entitled to due process. *Wolff v. McDonnell, supra* at 558.

A large number of lower federal courts have followed this Court's decision in *Wolff v. McDonnell, supra*, in applying the principles of due process to prisoner transfers, E.g., *Gomes v. Travisono*, 510 F.2d 537 (1st Cir. 1974), looking both at the motive for the transfer and the injury caused by it. If the motive for the transfer were to punish a prisoner for engaging in constitutionally protected activity, he would certainly be entitled to relief, *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) and if state officials attempt to bypass procedural safeguards by labeling, as administrative, what is clearly punishment, a prisoner is also entitled to relief. *Gomes v. Travisono*, 490 F.2d 1209, 1215 (1st Cir. 1973).

A disciplinary transfer may result in injury such as loss of good-time and segregation, which this Court has already held to be serious sanctions entitling a prisoner to due process. *Wolff v. McDonnell*, 418 U.S. at 571, n. 19. In addition, a prisoner may suffer adverse parole consideration, separation from counsel, family and freinds and the interruption of rehabilitative programs, all of which are comparable to punishments meted out for serious disciplinary infractions and call for due process safeguards. *Gomes v. Travisono*, 510 F.2d 537 (1st Cir. 1974).

It is in the interest of corrections officials and society to treat a prisoner fairly. *Morrissey v. Brewer*, 408 U. S. at 484; *Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973), and unfair or arbitrary treatment

is detrimental to the prisoner as well as to institutional interests. Believing it to be in their interest, the Federal Bureau of Prisons considers a disciplinary transfer to be as serious a sanction as the loss of good time or segregation, and provides federal prisoners with all of the procedures required by *Wolff v. McDonnell, supra* in cases of disciplinary transfers.

ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN REVERSING THE DISTRICT COURT'S DISMISSAL, WITHOUT A HEARING, OF A PRISONER'S *PRO SE* COMPLAINT WHICH ALLEGED THAT HE WAS DISCIPLINARILY TRANSFERRED FROM ONE PRISON TO ANOTHER, WITHOUT ANY MINIMAL DUE PROCESS, AS PUNISHMENT FOR VIOLATION OF A PRISON REGULATION AND THAT HE SUFFERED INJURY AS A RESULT OF SAID TRANSFER.

I.

The Allegations of a Complaint Must Be Taken as True for the Purpose of a Motion to Dismiss for Failure to State a Claim.

The respondent's *pro se* complaint was dismissed by the District Court, without a hearing, for failure to state a claim upon which relief could be granted.[5] In his complaint, the respondent raised two different

[5] The District Court devoted three sentences of its opinion to the transfer issue. (A. 26)

claims: First, that the seizure by prison officials of a "petition" he had circulated at Attica violated his "constitutional rights pertaining to access to the courts" and his "constitutional right to petition the courts for the redress of grievances as well as equal protection." His second claim was that he was transferred from Attica to Clinton as punishment, without due process, and that he was "extremely aggrieved" by the actions of the petitioners. (A. 2-6)

The petitioners submitted three affidavits in support of their motion to dismiss the first claim and did not address the second. Petitioners' own synopsis of the affidavits in their brief reads as follows:

> The responses of the Attica correctional officials (hereinafter defendants) stated that Haymes had been relieved of his job assignment because of his continual disregard for the rules governing inmates and the use of the law library (10a). It was further averred that Haymes' circulation of the petition was a direct violation of the prison rule prohibiting the rendering of legal assistance without prior permission (11a); that neither Haymes nor any other inmates had requested that he be allowed to assist them with the petition (11a); and that Haymes had been cautioned on several occasions about rendering legal assistance without approval (11a). (Br. for Pet. 4) (footnote omitted)

The District Court addressed each claim separately and, having considered affidavits from both parties on the seizure of the petition issue (A. 25), the Court obviously treated the petitioners' motion to dismiss as one for summary judgement pursuant to Rule 12, (b), (6), Federal Rules of Civil Procedure. (A. 31) At the same time, the District Court dismissed the unlawful transfer complaint for failure to state a claim.

The Court of Appeals, making no distinction between the treatment by the District Court of the two different claims, characterized the lower court's dismissal of the transfer claim as a summary judgment. Respondent submits that, although the Court of Appeals reached the proper result in reversing the District Court, the process by which the Court of Appeals reached that result was incorrect. Because the affidavits considered by the District Court only related to the seized petition issue, nothing was before that court on the transfer issue except the *pro se* complaint.[6] Because the facts relevant to the transfer issue (the only issue before this Court) were uncontroverted at the time of the District

[6]Though respondent agrees that consideration of materials extrinsic to the pleadings normally convert a 12(b) motion to a motion for summary judgement, such a conversion does not occur with uncontroverted pleadings. In *Duane v. Altenberg*, 297 F.2d 515 (7th Cir. 1962), affidavits were presented to the court, which found them "not competent for the purpose of negating the existence of a genuine issue of material fact where matters of motive or opinions or value are involved," 297 F.2d at 518. The court held the trial judge did not make the error of treating the defendant's motion as a summary judgment, but rather correctly disposed of the issue in an order to dismiss.

It is also proper for one allegation to be dismissed for failure to state a claim, while a second in the same complaint can be disposed of by summary judgement. In an action for violation of the securities and exchange acts in which the complaint alleged violations of three different sections, the court disregarded affidavits submitted as to two counts and dismissed for failure to state a claim, but finding that the affidavits as to the third count provided uncontradicted evidence dispositive of the claim, it treated the motion as to that claim as a motion for summary judgement. *Kaminsky v. Abrams*, 281 F. Supp. 501 (S.D. N.Y. 1968).

Court's opinion, this Court should properly recongize that the District Court granted a motion to dismiss.[7]

It is well settled that for the purpose of a motion to dismiss for failure to state a claim upon which relief may be granted, the allegations of the complaint must be taken as true.

> In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered. *Land v. Dollar*, 330 U.S. 731, 735 N.4 (1947)

See also Hoy v. Progress Pattern Company, 217 F.2d 701 (6th Cir. 1954); 2A *J. Moore, Federal Practice*, §12.08, pp. 2266-2267 (2d Ed. & Supp. 1974) (hereinafter *Moore's*).

[7]Alternatively, if this Court finds that the District Court granted a motion for summary judgement on the transfer issue, as did the Court of Appeals, respondent submits that the Court of Appeals decision should be upheld in finding that summary judgement was erroneously granted to the petitioners. Summary judgement pursuant to Rule 56 of the Federal Rules of Civil Procedure does not contemplate trial by affidavit. *Sartor v. Arkansas Natural Gas Co.*, 321 U.S. 620 (1944). When pleadings and affidavits present genuine issues of material facts, summary judgement is inappropriate. *Elgin, J & E Ry. Co. v. Burley*, 325 U.S. 711 (1945). As the Court of Appeals correctly points out, two genuine issues of material fact were and are still in dispute. (A. 32) Those issues, the motive for the transfer and the resulting injury are discussed in Section III, *infra*.

In addition, the doctrine of *Haines v. Kerner*, 404 U.S. 519 (1972), discussed in Section II, *infra*, should be read to apply at the summary judgement stage, particularly when the respondent filed an affidavit controverting those filed by the petitioners. See footnote 7 of the Court of Appeals decision. (A. 38)

It is also clear that the complaint is to be read in the light most favorable to the plaintiff. If any reasonable inference can be drawn from the facts which would entitle a plaintiff to relief, a defendant's motion to dismiss must fail. *Scheuer v. Rhodes*, ____ U.S. ____, 94 S. Ct. 1683, 1686 (1974). *See generally Moore's*, §12.08, pp. 2271-2274.[8]

This Court has consistently stated that upon appeal from a motion to dismiss, the facts alleged in the complaint are also to be taken as true. In *Cooper v. Pate*, 378 U.S. 546 (1964) (*per curiam*), this Court accepted as true the allegations of a prisoner's complaint, and held that the District Court and the Seventh Circuit Court of Appeals were in error to dismiss it. Similarly, in *Cruz v. Beto*, 405 U.S. 319 (1972), this Court, citing *Cooper v. Pate, supra*, reversed the dismissal of a prisoner's complaint of religious discrimination because the allegations of the complaint were to be taken as true. See also, *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); *Gardener v. Toilet Goods Association*, 387 U.S. 167 (1967); *Escalera v. New York Housing Authority*, 425 F.2d 853, 857 (2d Cir. 1970), *cert. denied* 400 U.S. 853 (1970).

Thus we start with the proposition that the ordinary litigant is entitled to his day in court and turn to the plight of the prisoner-litigant.[9]

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[8] As discussed in Section II, *infra*, the standard of "reasonable inference" is far less stringent when the complaint was drafted *pro se* by a prisoner.

[9] We repeat, for emphasis, that the District Court never held a hearing in this case before it dismissed the respondent's complaint.

II.

A Prisoner's *Pro Se* Complaint Is Held to Less Stringent Standards Than Formal Pleadings Drafted by Lawyers and May Not Be Dismissed Unless It Appears Beyond Doubt That The Plaintiff Can Prove No Set of Facts in Support of His Claim Which Would Entitle Him to Relief.

More than twenty years ago Mr. Justice Frankfurter admonished:

> Care will naturally be taken that the frequent lack of technical competence of prisoners should not strangle consideration of a valid constitutional claim that is bunglingly presented.
>
> *Brown v. Allen*,
> 344 U.S. 443, 502 (1953)

This Court recognized the mandate of Rule 8(f) of the Federal Rules of Civil Procedure that "All pleadings shall be so construed as to do substantial justice" in *Conley v. Gibson*, 355 U.S. 41, 45 (1957) when it stated:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Haines v. Kerner, 404 U.S. 519 (1971) settled the law on interpreting a prisoner's *pro se* complaint by holding that such a complaint must be given the most liberal and favorable construction by the courts. In *Haines*, the prisoner-plaintiff's *pro se* complaint alleged general physical injuries and denial of due process while in disciplinary confinement. The Seventh Circuit

affirmed dismissal of his complaint, emphasizing prison officials' "wide discretion" in disciplinary matters. This Court addressed only the question of whether the District Court erred in dismissing the inmate's *pro se* complaint without hearing evidence on his claims. Careful not to intimate any view on the merits of the inmate's complaint, nor on the scope of inquiry by courts into prison administration, the Court reversed. The test applied was whether the Court could say with assurance, holding the *pro se* complaint to less stringent standards than those drafted by lawyers, that it appeared beyond doubt that the plaintiff could not prove a set of facts which would entitle him to relief. Applying that standard, the Court reversed the dismissal of the prisoner's complaint holding that "he is entitled to an opportunity to offer proof". 404 U.S. at 521.

Subsequent circuit court of appeals decisions have unhesitatingly followed the principles established in *Haines v. Kerner, supra.* In *Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974) the Ninth Circuit reversed the dismissal of a *pro se* prisoner's complaint which alleged that they were punitively transferred without due process because of their religious beliefs. The Second Circuit reversed the dismissal of a *pro se* prisoner's complaint that he was hindered in his ability to prepare legal papers in *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1972). See also *Blair v. Rockefeller*, 469 F.2d 641 (2d Cir. 1972); *Russell v. Bodner*, 489 F.2d 280 (3rd Cir. 1973); *Jones v. Lockhart*, 484 F.2d 1192 (8th Cir. 1973); *Gregory v. Wyse*, 512 F.2d 378 (10th Cir. 1975); *Bryant v. Harris*, 465 F.2d 365 (7th Cir. 1972).

It is important to note that in *Haines v. Kerner, supra* this Court did not delve into the substantive law

of due process and prison discipline saying that "although we intimate no view whatever on the merits of petitioner's [the prisoner] allegations, we conclude that he is entitled to an opportunity to offer proof." 404 U.S. at 521. The case at bar is in precisely the same posture and the respondent submits that where Constitutional questions of such importance are at issue,[10] it would be inappropriate for this Court to rule on those questions absent a record.[11]

The Second Circuit Court of Appeals found that two genuine issues of material fact were never addressed or resolved by the District Court. These are "whether he (the respondent) was moved to Clinton Correctional Facility as punishment for his disobedience of prison rules and policies, and whether the effects of transfer were sufficiently harsh to make denial of a hearing a violation of due process."[12] (A. 32) Without affording

[10]As we point out in Section III, *infra*, these important questions have been, and are presently being, considered by many lower federal courts. Indeed, at least one case involving similar issues is presently before this Court. *Meachum v. Fano*, No. 75-252, O.T. 1975, cert. pet. pending.

[11]Compare the petitioners' assertions, *hors* the record, that the respondent suffered no injury from the transfer because there was nothing in his file from which the parole board could draw a negative inference (Br. for Pet. 16, 17) with the *appendices* to respondent's brief.

[12]Although the petitioners suggest for the first time a possible immunity defense in a footnote at page 14 of their brief, we agree with the Solicitor General that this defense, if any, has been abandoned. (Br. for United States as Amicus Curiae, 7., n. 7) In any event, whether the petitioners acted in good faith, necessary to support an immunity defense, is a question of fact which requires an evidentiary hearing. *Scheuer v. Rhodes*, ____ U.S. ____, 94 S. Ct. 1683, 1693 (1974).

the respondent an opportunity to present evidence on those factual questions, any decision this Court would make as to the rights of a victim of punitive transfer would be based on speculation.[13]

This Court should either decide that certiorari was improvidently granted and dismiss the petition, or affirm the decision below, remanding the case to the District Court for an evidentiary hearing.

III.

The Due Process Clause of the Fourteenth Amendment Requires That a Prisoner Who Is Disciplinarily Transferred as Punishment For Violation of a Prison Regulation And Who Suffers Grievous Loss as a Result of Said Transfer Be Given Notice and Opportunity For a Hearing.

A. A Prisoner's Interest in Due Process

This Court has repeatedly held that a due process hearing is necessary before the government may act in a way injurious to private interests whenever "the nature of the interest [jeopardized by governmental action] is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Involuntary transfers directly and indirectly compromise the most

[13]This Court refused to engage in such speculation in a transfer case decided just last term. *Preiser v. Newkirk*, ____ U.S. ____, 95 S.Ct. 2330, 2335 (1975).

fundamental of a prisoner's interests – the interest in personal liberty and freedom from oppressive conditions of incarceration. In the words of Mr. Justice White:

> But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

Involuntary transfers – as much as any other sanction that this Court has deemed requisite of due process protection – abridge interests of "real substance" and are "sufficiently embraced within Fourteenth Amendment 'liberty' to entitle [the prisoner] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause. . . ." *Wolff v. McDonnell, supra*, at 557; *Morrissey v. Brewer, supra* at 481. To suggest otherwise is to draw tight the curtain to which Mr. Justice White alludes.

The petitioners' assertion that "The Commissioner is specifically empowered by statute to 'transfer inmates from one correctional facility to another' " (Br. for Pet. 8),[14] without regard to the Fourteenth Amendment, is

[14]The Solicitor General, conceding that the respondent was the subject of a disciplinary transfer (Br. for the United States as *amicus curiae*, 1), expands on that assertion by saying that a prisoner has no constitutional "liberty interest in being free of potentially less advantageous circumstances in a different prison, even if the difference amounts to 'grievous loss' " and that arbitrary transfer decisions or factually mistaken decisions "while unpleasant" are not "barbaric". (*Id* at 8) Presumably, they argue that the Constitution only deals with barbarism.

analogous to the position taken by the State of Nebraska when they claimed "that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue." *Wolff v. McDonnell, supra* at 555. This Court answered Nebraska's claim by reaffirming that "the touchstone of due process is protection of the individual against arbitrary action of government." *Wolff, supra* at 558.

"It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer, supra* at 481. Accordingly, hearings to determine continued eligibility for public assistance must afford the rights of confrontation and cross-examination and the assistance of retained counsel, but do not require the appointment of counsel, *Goldberg v. Kelly*, 397 U.S. 254 (1970); hearings looking toward revocation of probation or parole may, on finding of good cause by the hearing officer, withhold the rights of confrontation and cross-examination, *Morrissey v. Brewer, supra* at 487-89, but there is a right to appointed (as well as retained) counsel in certain designated circumstances, to be decided on a case-by-case basis, *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973); inmates facing prison disciplinary proceedings have no absolute right of confrontation, but are afforded a limited right to call witnesses on their behalf and to have the assistance of a counsel-substitute, *Wolff v. McDonnell, supra* at 567-70; students facing public school disciplinary proceedings need not be afforded the right to call supporting witnesses (nor, *a fortiori*, are they entitled to the rights of confrontation or legal assistance), but they do

ordinarily have the right to prior notice and an opportunity to appear personally to present their version of events, *Goss v. Lopez*, 419 U.S. 565, 581 (1974).

These cases illustrate the flexibility of due process and that the Fourteenth Amendment does not tolerate an absolute claim of "no due process" where a prisoner suffers grievous loss resulting from arbitrary government action. The flexible nature of procedural due process allows legitimate state interests to be protected without sacrificing the procedural protections which are essential to accurate fact-finding and freedom from arbitrary and punitive government action. In considering the question of the applicability of due process, it is clear that neither the fact that we are dealing with convicted prisoners, nor the fact that a prisoner has no statutory claim to confinement at a particular institution, is dispositive of the question.

> I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the Court's holding that the interest of inmates in freedom from imposition of serious discipline is a "liberty" entitled to due process protection. *Wolff v. McDonnell, supra* at 580. (Marshall, J. dissenting in part)

And "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.' *Graham v. Richardson*, 403 U.S. 365, 374 (1971)." *Morrissey v. Brewer, supra* at 481.[15]

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[15]The Solicitor General attempts to resurrect the rejected right/privilege distinction by labeling the respondent's interest as a privilege while conceding the possibility of a punitive transfer and grievous loss. (Br. of United States as *Amicus Curiae*, 16-30)

The petitioners argue that "the New York statutory scheme refutes any claim of entitlement by an inmate to be placed or retained at any particular facility." (Br. for Pet. 9),[16] thereby suggesting that a prisoner only has a liberty interest when the state creates that interest by statute. This Court has said that "We think a person's liberty is *equally protected, even when the liberty itself is a statutory creation* of the state.", *Wolff, supra* at 558 (emphasis added) and went on to point out that it is protection "against arbitrary action of government" that is "the touchstone of due process." *Id* at 558.

The First Circuit Court of Appeals, in a post-*Wolff* transfer decision, properly identified[17] the prisoner's interest which requires due process safeguards:

> There were specific findings made by the district court as to the treatment of the transferees seeking relief in this case. The court found that the transferred inmates were segregated in the receiving prisons for two to six weeks, were placed in work assignments inconsistent with their prior experience, were precluded from rehabilitative and educational programs, saw few of their friends and family, and none of them saw their attorneys. Finally, the court found that parole opportunities were affected. 490 F.2d at 1213. We concluded that, beyond these specific findings, transfer inherently involves discontinuity of program, difficulty of communication, administrative isola-

[16]The Solicitor General makes this same obfuscatory claim. (Br. for United States as *amicus curiae*, 16).

[17]This identification highlights the appropriateness of the action of the court below in remanding this case to the District Court for an evidentiary hearing.

> tion pending integration into the new prison community and the possibility of a "trouble-maker" status which might occasion an unfavorable parole decision. It suffices here to say that the presence of privations which are either identical to or comparable to punishments meted out for disciplinary infractions calls for some due process safeguards in interstate transfer cases. *See Wolff, supra*, 418 U.S. at 571, 94 S. Ct. at 2982 n. 19.
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> *Gomes v. Travisono*, 510 F.2d 537, 539 (1st Cir. 1974).[18]

B. Post-Wolff Transfer Law

This Court's landmark decision of *Wolff v. McDonnell, supra*, has served as the guidepost for at least six United States Courts of Appeals and six United States District Courts which have since issued opinions concerning prisoner transfers.[19] *Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973, vacated and remanded, 418 U.S. 908, on reconsideration, 510 F.2d 537 (1974); *Stone v. Egeler*, 506 F.2d 287 (6th Cir. 1974); *Ault v. Holmes*, 506 F.2d 288 (6th Cir. 1974); *Fano v.*

[18]It is also clear as the court below pointed out, that a serious equal protection violation would occur if prisoners were provided some procedural due process at a disciplinary hearing for certain conduct, but were transferred without any due process for the same conduct. "But it would be anomalous indeed, 'both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure-free punishment which they could not accomplish within their own walls.' " (A. 36)

[19]A number of federal courts ruled that the due process clause applied to prisoner transfers even before this Court's decision in *Wolff*. See for example, *Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973) and the cases cited therein.

Meachum, ____ F.2d ____, Civ. No. 75-1033 (1st Cir. June 27, 1975); *Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974); *Carlo v. Gunter*, ____ F.2d ____, Civ. No. 75-1163 (1st Cir. August 4, 1975); *McLaughlin v. Hall*, ____ F.2d ____, Civ. No. 74-1148 (1st Cir. June 27, 1975); *Walker v. Hughes*, 386 F. Supp. 32 (E.D. Mich. 1974); *Robbins v. Kleindienst*, 383 F. Supp. 239 (D.C.D.C. 1974); *Clonce v. Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974); *Rosenberg v. Preiser*, 388 F. Supp. 639 (S.D.N.Y. 1975); *Tai v. Thompson*, 387 F. Supp. 912 (D. Hawaii, 1975); *Daigle v. Hall*, 387 F. Supp. 652 (D. Mass. 1975). Each court has found that the principles of due process as applied in *Wolff* should apply with equal force to prisoners who will suffer grievous losses as a result of their transfer from one prison to another. In at least two cases, *Daigle v. Hall, supra*, and *Carlo v. Gunter, supra*, the courts applied those principles to disciplinary transfers within one prison's walls and *Stone v. Egeler, supra*, involved an intrastate transfer from one maximum security prison to another.

C. The Motive For The Transfer[20]

The importance of an evidentiary hearing is illustrated by the need to distinguish between the label

[20]Even if one were to accept the petitioners' "no entitlement" argument, an argument we believe erroneous, certainly if an evidentiary hearing disclosed that the respondent was transferred (punished) for engaging in constitutionally protected activity (his First Amendment right to protest prison conditions and his Sixth Amendment right to petition the court for redress) as he alleges

affixed by the state to its action and the actual motivation for the action taken. Many of the post-*Wolff* transfer cases concerned to some extent the plight of a prisoner, who, unlike respondent Haymes, had not been transferred for "disciplinary" reasons, but who had suffered grievous losses nonetheless because of the inherently punitive aspects of the transfer process.[21] As

(A. 3, 19), he would be entitled to relief against improper official action.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.
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> *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

The Solicitor General concedes that much. (Br. for United States as *Amicus Curiae*, 25, n. 12)

[21]This includes all the cited cases with the exceptions of *Robbins v. Kleindienst*, *Rosenberg v. Preiser*, *Fajeriak v. McGinnis*, and *Daigle v. Hall, supra*, which focused to some extent on the punitive motive behind the transfers. These cases correspond even more readily to respondent Haymes' allegations. But see *Tai v. Thompson, supra*, in which the court found an inmate's transfer similar in loss of liberty to solitary confinement, thus requiring *Wolff*-type hearings despite the absence of allegations of punitive motive. 387 F. Supp. 912, n. 12.

required by *Wolff, supra* and *Morrissey, supra*, each court based its decision on a careful analysis of the nature of the losses suffered by the prisoner, rather than on the stated purpose of the proposed transfer. The First Circuit found that

> [s]ince the disadvantages to the inmate flowing from an interstate transfer are substantial, whether it be characterized as punitive, administrative, or rehabilitative, the same safeguards should be available in all such cases. *Gomes v. Travisono*, 510 F.2d at 541.

In *Fano v. Meachum, supra*, the Court of Appeals stated, "It should not escape notice that, aside from the distinction above, [the fact that in *Gomes*, the inmates endured a major geographical displacement and administrative segregation resulting from an interstate transfer] the consequences of intrastate and interstate are for the most part indistinguishable." Slip opinion at 6.[22]

[22]The Solicitor General quotes at length from Judge Campbell's dissent in *Fano* (Br. for United States as Amicus Curiae, 28-30) but neglects to include the penultimate paragraph of the dissenting opinion:

> Nonetheless, while the greater good of the institution and its other inmates may require that administrators retain broad transfer power, there can be no reason to permit an inmate's parole chances to be diminished by derogatory information he is never allowed to meet. This is a separate and different question. If Parole is a "liberty" right entitling an inmate to fair procedures, I would forbid the use of the fact of transfer by the parole board unless the charges upon which the transfer was based were established in a manner comporting with due process. Slip op. 13.

As we point out in the next section, this may be precisely what happened to the respondent at his first parole hearing.

The *Walker, Clonce*, and *Robbins* decisions were less concerned with the fact that the transfers were interstate, than with identifying the losses resulting from the transfers. They also looked at motive according to the rationale of *Wolff* that "there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." *Wolff v. McDonnell*, 418 at 571, 572, n. 19.

Each court reached that conclusion after finding that involuntary transfers, whether categorized as "disciplinary" or as "classification", resulted in loss of personal property, legal papers, and medical records; delay in parole hearings or denial of parole; placement in "administrative" segregation upon arrival at the receiving prison which was no less restrictive than "disciplinary" segregation; loss and diminution of correspondence and visiting opportunities; change, and often loss of program opportunities; the delay and often the denial of statutory entitlements, such as good time credits, furloughs and work-release programs.[23]

The petitioners contend that there cannot be a disciplinary or punitive transfer in the New York penal system because "transfers are not among the penalties which can be imposed after prison disciplinary hearings." (Br. for Pet. 9)[24] That, respondent submits,

[23]Many of these losses were described as possible injury suffered by the respondent Haymes in the Court of Appeals decision below. (A. 37, 38) These losses will be discussed in greater detail in a separate section, *infra*.

[24]The petitioners elaborated on this contention in the oral argument before this Court in *Preiser v. Newkirk*, No. 74-107, ____ U.S. ____, 95 S.Ct. 2330 (1975) (transcript of oral argument, pp. 14-17, 59, January 20, 1975).

However both the American Correctional Association (Manual of Correctional Standards 416, 1972) and the United States

is merely a process of labeling by which the state attempts to create "a distinction too gossamer-thin to stand close analysis." *Johnson v. Chairman*, 500 F.2d 925, 928 (2nd Cir. 1974), vacated as moot *sub. nom. Regan v. Johnson*, 419 U.S. 1015 (1975). The substance of the petitioners' argument is that they wish to retain the option of how to deal with alleged misconduct by prisoners. Thus, if the State of New York wishes to punish a prisoner for circulating a petition in "direct violation of [the] prison rule" (Br. for Pet. 4) or "because of his illicit activities in the law library,"[25] they apparently cannot use transfer as a

Bureau of Prisons (Policy Statement No. 7400.5D, Inmate Discipline) recognize that transfer is an appropriate disciplinary sanction. Indeed, the Bureau of Prisons provides a prisoner with due process before a disciplinary transfer.
(Br. for United States as *amicus curiae*, 3)

[25]The petitioners assert various claims which are outside the record in this case. For example, "Haymes was not subjected to disciplinary confinement or the forfeiture of good-time credits," (Br. for Pet. 12) and "It is speculative in the extreme to imagine that the mere notation that an inmate has been transferred carries a negative inference." (Br. for Pet. 16) Similarly, the Solicitor General states that "no notation was made in his [respondent's] records that would reflect adversely on his behavior or diminish his opportunities for parole." (Br. for United States as *amicus curiae*, 5)

In order to present a fair picture to the Court, respondent is compelled to attach as Appendix 1 to this brief a copy of an official document of the State of New York, Department of Correctional Service, which appears in respondent's file. This document, referring to the June 9, 1972 transfer from Attica, states that "the transfer was necessitated because of his illicit activities in the law library."

This document places in conflict the petitioners' assertion that the respondent was transferred because he was circulating a petition in violation of a prison rule as well as the respondent's claim that he neither violated that prison rule nor did he do anything "illicit" while employed in the law library.

sanction (Br. for Pet. 9) if they comply with this Court's mandate in *Wolff*. They merely label the transfer as administrative and not disciplinary, thereby bypassing the requirement for procedural due process.

This labeling argument has been advanced before and has been given short shrift by the courts. In *Howard v. Smith*, 365 F.2d 428 (4th Cir. 1966) the court rejected an argument that confinement in a maximum security ward was not "punishment" but merely "segregation." The court went on to find that while segregated confinement is not as harsh as solitary, the limitation of certain privileges required due process. The rejected argument is markedly similar to the one put forward by petitioners. And in another transfer case, where the state attempted to distinguish between "disciplinary" and "administrative" transfers, the court said that "Administration by label is as abhorrent as is jurisprudence by label – unjust results readily occur under either approach. Affixing a label to determine the outcome may well also mask or conceal the interests involved. An identification of those interests is vital if they are to be protected from grievous harm or loss." *Kessler v. Cupp*, 372 F. Supp. 76, 77 (D. Oreg. 1973). See also, *Gomes v. Travisono*, 490 F.2d 1209, 1215 (1st Cir. 1973).

Having moved beyond the petitioners' label and clearly illustrated the need for some fact-finding procedure to determine which of the alleged wrongful acts the respondent was being punished for, and whether or not he committed any wrongdoing, we turn now to the question of injury.

D. Transfer and Grievous Loss[26]

It would be simplistic to examine the question of grievous loss merely by looking at the security levels of the prisons in question as suggested by the petitioners. That would ignore the reality of prison life. The Court of Appeals was correct in refusing to "condone the idea that the mere fact of incarceration permits a prisoner to be punished at the whim of those charged with his confinement." (A. 28)

This Court has already held that the loss of good-time credits is a "liberty" interest "sufficiently embraced within [the] Fourteenth Amendment . . . to entitle him [the prisoner] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell*, 418 U.S. at 557. The State of New York has created by statute a right to earn good-time credits.[27] The petitioners argue that the respondent

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[26]The petitioners dwell on their claim that the respondent did not specifically allege the kinds of injuries that the Court of Appeals discussed in the opinion below. (A. 37, 38) We have already reviewed the *Haines v. Kerner* standard which must be applied to a *pro se* prisoner's complaint in Section II, *supra*. Furthermore, the *pro se* complaint, among other things, sought damages. It is difficult to conceive of how one might claim damages without suffering injury.

[27]7 NYCRR § § 260-61, N.Y.CORR.L

§ 803. Good behavior allowances against indeterminate sentences

1. Every person confined in an institution under the jurisdiction of the state department of correction serving an indeterminate sentence of imprisonment, except a person serving a sentence with a maximum term of life imprisonment, may receive time allowances against the maximum term of his sentence not to exceed in the aggregate one-third of the term imposed by the court. Such allowances may be granted for good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program, and may be withheld, forfeited or cancelled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned.

N.Y. Corr. L. § 804 is an analogous provision for good behavior allowances against definite sentences.

"Haymes was not subjected to disciplinary confinement or the forfeiture of good-time credits." (Br. for Pet. 12) On the record before this Court, as well as the two lower courts, there is no way of knowing whether that claim is true.

Furthermore, assuming *arguendo* that the respondent lost no good-time as a direct punishment for the alleged misconduct which led to his transfer, his early release on good-time could still be affected by the transfer. In New York, an in-prison committee called the Time Allowance Committee has the power to determine how much lost good-time is restored to a prisoner after he serves two-thirds of his maximum sentence. Since a record notation of a punitive transfer and the reasons therefor[28] can significantly affect the thinking of the Time Allowance Committee, the mere motation may be enough to reduce the ultimate good-time allowance and inflict grievous loss.

The petitioners, while denying that there is anything in the respondent's file concerning the transfer which

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[28]As we point out in the footnote on p. *21*, *supra*, such a notation exists in the respondent's records. See Respondent's Appendix 1.

could affect his parole, appear to concede that the respondent would suffer serious injury if his parole chances were affected. (Br. for Pet. 16, 17)[29] As we previously indicated, there is in the respondent's file, a document[30] which states that the was transferred for "illicit activities." The Court of Appeals wisely pointed out that "the fact of transfer, and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom" (A. 37)

The respondent first became eligible for parole in July of 1974, two years after the disciplinary transfer. The decision at that Board of Parole meeting was that the respondent be "held to 7/75 Board with improved [disciplinary] record.[31] He appeared before the Parole Board again in July of 1975 and again the decision was that he be "held 9 months for improved [disciplinary] record."[32] We have no way of knowing of course whether the Parole Board based its decision on the record of the transfer for "illicit activities in the law library", but it is certainly a reasonable hypothesis. This is quite different from the situation this Court found in

[29]The Solicitor General appears to share this view by saying that "no notation was made in his records that would reflect adversely on his behavior or diminish his opportunities for parole." (Br. for United States as *amicus curiae*. 5)

[30]Respondent's Appendix 1.

[31]A copy of the July 1974 Parole Board Decision Notice is attached as Appendix 2 to this brief.

[32]A copy of the July 1975 Parole Board Decision Notice is attached as Appendix 3 to this brief.

Preiser v. Newkirk, supra, where there was a "specific record notation that the transfer [of the prisoner] should have no effect on good time or parole decisions . . .". 95 S. Ct. at 2335.

In a case involving mass transfers, the First Circuit said that "the authorities should expunge the fact of transfer from that plaintiff's record or at least include a notation that the determination had been made under emergency conditions not comporting with due process so that there should remain no continuing adverse impact by reason of the transfer on plaintiff's opportunities for . . . parole." *Carlo v. Gunter*, ____ F.2d ____, Civ. No. 75-1163, slip op. at 7 (1st Cir. Aug. 4, 1975). And as Judge Campbell said "there can be no reason to permit an inmate's parole chances to be diminished by derogatory information he is never allowed to meet." *Fano v. Meachum, supra*, slip op. at 13 (dissenting opinion). The record in this case is at least clear that derogatory information exists in the respondent's file and he has never been allowed to challenge its accuracy.

One of the respondent's most serious injuries, as a result of the transfer, was his separation from family and friends. Haymes is a resident of Buffalo, New York, where his parents and two brothers reside. He was transferred from Attica which is outside of Buffalo, to Clinton, several hundred miles away. Consequently, his ability to receive visits from his family and friends was seriously diminished.[33]

[33]Indeed, this injury is acknowledged by petitioners' own records. See Appendix 1 to this brief. This document from the respondent's file states that if the respondent were returned to Attica "it would be possible for him to receive more visits than at Clinton because his family resides in Buffalo. Perhaps his motivation would thus be increased." The document is signed by respondent's Correction Counselor and the Superintendent (Warden) at Clinton.

The positive rehabilitative effects of visits from family and friends has been noted. *Pell v. Procunier*, 417 U.S. 817 (1974). In *Ault v. Holmes*, 506 F.2d 288, 289 (6th Cir. 1974) the court stated "... [I]nterstate transfers might adversely affect plaintiff's chances for parole, would make visits of family and friends more difficult, and would require new adjustment to a different institution." When considering the effect on visitation in a state as large as New York, the distinction between interstate and intrastate transfers diminishes.

This Court, in *Procunier v. Martinez*, 416 U.S. 396 (1974);[34] *Pell v. Procunier, supra;* and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) has shown great reluctance in curtailing visitation and correspondence rights of prison inmates. Yet allowing punitive summary transfers would impower prison officials to effectively inhibit those rights. Such a ruling would allow prison officials to do summarily what the Constitution forbids by regulation.

It is also sound penal policy to place an inmate close to his community. The Federal Bureau of Prisons has enunciated a policy of attempting to place inmates near his or her place of residence.[35] Furthermore, the present Correction Commissioner of New York recently stated:

[34]In *Procunier v. Martinez*, the Court recognized that interference with communication between prisoners and their families "...necessarily impinges on the interest of each." because "the interests of both parties are inextricably meshed." 416 U.S. at ____, 94 S. Ct. at 1809. Thus, the interests of respondent's parents and brothers are involved in this case as well.

[35]Bureau of Prisons, Policy Statement No. 7300.13E, dated June 16, 1975.

> Our prisons now are all maximum security, like concentration camps if you will, ... My job is to get the prisoner out of the giant institutions like Attica and into the community. That's why I'm pushing – with Gov. Carey's help – a program of opening small community facilities, so we can get the inmates nearer their families. Hell, an inmate lives for visiting day. You can't have too many visitors when your family is in New York City and you're up in Attica. Getting the inmates close to home – that's our goal and we're hoping to convince communities that it's best for them.
> –Commissioner Ward as quoted in *New York Daily News*, August 18, 1975 at 30.

A number of recent studies conclude that it is within the state's interest of reducing recidivism, encouraging rehabilitation, and reintegration of an offender into society to incarcerate people near their home community. The National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 11, 354 (1973) lists as one of the "serious disadvantages" in constructing institutions in sparsely populated areas: "3. The prolonged interruption of offender's contacts with friends and relatives, which are important to the reintegration process." W. Nagel, *The New Red Barn: A Critical Look at the Modern American Prison*, 184 (1973)[36] lists eight reasons for the desirability of locating penal institutions near major population centers. Foremost on that list, he stresses such a location would facilitate easier visitation by relatives.

[36]This book resulted from a study made by Mr. Nagel and the American Foundation's Institute of Corrections at the request of the Department of Justice, Law Enforcement Assistance Administration (LEAA).

While little is known by penal experts on the reasons for recidivism, most all agree that availability of a job and close proximity of family are the best assurances against it. These means to the end of reintegration into society are furthered by placement of the inmate near his residence. Visitation is perhaps the most important link of an inmate to his family and community. To transfer an inmate, thus straining his access to the community, is self-defeating to the supposed rehabilitary function of a sanction. As far back as 1958 the United Nations recognized the importance of prisoner-family relations.

> § 79. Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both.
> § 80. From the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation.
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> United Nations Department of Economic and Social Affairs, *Standard Minimum Rules for the Treatment of Prisoners and Related Recommendations* § § 79-80, at 80 (U.N. Publication, Sales #: 1956.IV.4, 1958).

More recent studies in the United States confirm this proposition.

> Within the terms of imprisonment imposed, there is a growing and determined effort to break down the prison walls in the sense that the walls keep community influences out. It is recognized

> that every effort must be made to preserve any social ties the prisoner may have. Hence, restrictions are fewer on regular visiting, censorship of prisoners' mail is ending. . . . There emerges a serious commitment, particularly for the bulk of less threatening prisoners, to the reduction of their social isolation.
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> N. Morris, *The Future of Imprisonment*, 8-9, U. of Chicago Press (1974).

Staff and inmates alike spoke to us of the importance of visiting. It is usually the principal remnant of any direct, personal relationship with the outside world. The old policies based on maximum separation of the inmate from the influences of the outside world have been discredited. Today most correctional officials recognize that outside contacts are not only desirable but necessary. Offenders are humans, and humans are social beings. – W. Nagel, *supra* at 102.

> Whether a person is confined across town in a jail or across the State in a prison, confinement totally disrupts his relationship with his community. The longer confinement persists, the more alienated the individual becomes. Strained ties with family and friends increase the difficulty of making the eventual transition back to the community. . . .
>
> Correctional authorities should not merely tolerate visiting but should encourage it. This extends to providing or paying for transportation when the cost of traveling to the facility would be a limiting factor. Such a provision is plainly needed to equalize the situation of rich and poor inmates. Expenses of this type can be minimized by incarcerating offenders in their own community or through expanded use of furlough programs. –

National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 2.17, at 68 (1973) (hereinafter, *Corrections.*)

It follows logically, that transfer, which in this case drastically reduced the frequency of visitation Haymes enjoyed, is a serious sanction. The National Advisory Commission, *Corrections, supra,* Standard 2.13 specifically disdains the use of transfer as a sanction.

> Each correctional agency should immediately promulgate written rules and regulations to prescribe the procedures for determining and changing offender status, including classification, transfers, and major changes or decisions on participation in treatment, education, and work programs within the same facility.
>
> * * *
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> 2. The offender should be permitted to make his views known regarding the . . . transfer, . . . under consideration. . . .
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> * * *
>
> 4. Proceedings for nondisciplinary changes of status should not be used to impose disciplinary sanctions or otherwise punish offenders for violations of rules of conduct or other misbehavior.

Transfer as a sanction for misconduct imposes grievous loss and requires some due process.

In addition to severing ties with family and friends, a transfer over any distance may subvert an inmate's relationship with counsel. Many inmates establish ties with local attorneys subsequent to their institutional placement. An attorney who has represented an inmate since his incarceration will have increased difficulties preparing the inmate's legal matters. In addition,

important correspondence between the inmate's attorney and the inmate will inevitably be delayed, possibly lost, while the inmate, (who had no notice to advise expected correspondents) is shuffled about the state's penal system. This effective interference with prisoner correspondence by "arbitrary governmental invasion" directly opposes the dictates of this Court in *Procunier v. Martinez, supra.* Thus disciplinary transfers may serve to inhibit an inmate's Sixth Amendment right to counsel.

Federal courts have also consistently recognized that assignment to disciplinary segregation requires due process protection for the inmate. See, e.g. *Wolff v. McDonnell*, 418 U.S. at 571, n. 19; *Carlo v. Gunter*, Civ. No. 75-1163 (1st Cir. 1974); *United States ex rel Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973); *Daigle v. Hall*, 387 F. Supp. 652 (D. Mass. 1975). Courts have recognized the grievous loss suffered by an inmate who is separated from the rest of his community.

> In the prison context, except for the loss of life itself and except for the imposition of those conditions which would constitute cruel and unusual punishment in violation of the Eighth Amendment, confinement in punitive segregation is as loathsome and wretched as is legally permissible; there is nothing worse.
>
> *Sands v. Wainwright*, 357 F. Supp. 1062, 1082 (M.D. Fla. 1973)

Respondent submits that a transfer, while not necessarily worse, may be as adverse as punitive segregation. Like punitive segregation, the transferred inmate is removed from his friends and acquaintances within the prison, suffering the same feelings of

loneliness and alienation.[37] Like punitive segregation, the transferred inmate loses the last scintilla of control over his ever constricting environment. In effect, therefore, the punitive transfer acts much like solitary confinement.

Added to respondent's possible grievous loss would be the disruptive effect of summary punitive transfer to any ongoing medical care of the respondent, and any rehabilitative or educational programs in which he participated.[38] Such abrupt withdrawal from these programs is not only grievous loss to the respondent, but is detrimental to the state's interest in rehabilitation. With fair and adequate notice, the respondent could have made efforts to constructively terminate his participation in these programs, or provided for their continuation at Clinton. The latter possibility is suggested under the generous assumption that Clinton provides the same programs as Attica.

When considering program opportunities, it would be absurd to accept petitioner's assumption that all

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[37]Upon transfer, a prisoner is required to adjust to a new environment where he may be branded as a troublemaker. Summary transfers of prisoners considered to be troublemakers run counter to the interests of prison officials. The New York State Special Commission on Attica cites the regular practice of transferring inmates with leadership ability to keep them from developing a following as one of the many factors leading to the Attica Rebellion of 1971. *Attica: The Official Report of the New York State Special Commission on Attica*, 121 (1972).

[38]Because of the notation in his record concerning "illicit activities in the law library," the respondent has been refused work in the law library since 1972.

maximum security prisons are alike.[39] In *Stone v. Egeler*, 377 F. Supp. 115, 117 (W.D. Mich. 1973) *aff'd as modified*, 506 F.2d 287 (6th Cir. 1974) the District Court noted a significant difference between two maximum security institutions within the Michigan state penal system. The Court found the difference caused the transferred inmates grievous loss. On appeal, the Circuit Court held *Wolff*-type hearings were required. 506 F.2d at 288. Since respondent here was not afforded a hearing, no evidence was taken on the possible differences between Attica and Clinton.

Thus, "It suffices here to say that the presence of privations which are either identical to or comparable to punishments meted out for disciplinary infractions calls for some due process safeguards in. . . transfer cases." *Gomes v. Travisono*, 510 F.2d 537 (1st Cir. 1974).

E. The Interests of the Prisoner and the Interests of the Prison System.

At the outset, the Solicitor General makes a confusing argument for the government's interest as *amicus*. He first admits that the Bureau of Prisons requires *Wolff*-type hearings in cases of disciplinary transfer. (Br. of United States as *amicus curiae*. 3) Yet, he will not concede that the Constitution mandates such hearings. (Br. of United States as *amicus curiae*. 4)

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[39]At the oral argument before this Court in *Preiser v. Newkirk, supra*, the Assistant Attorney General for the State of New York said: "Now, in point of fact, there are no two institutions in New York that are exactly alike. . . ." (transcript of oral argument, p. 57, January 20, 1975).

He argues first, that a ruling requiring hearings in disciplinary transfers would interfere with other decisions the Bureau must make, and second, that it would "inhibit the continuing development and revision by the Bureau of its transfer procedures." (Id. at 4) Evidently, the Bureau of Prisons has not felt the need to engage in "continuing development and revision . . . of its transfer policies," at least not since Bureau of Prisons Policy Statement 7400.5C (promulgated Nov. 4, 1974), was superceded by 7400.5D (promulgated July 7, 1975). None of the provisions relevant to disciplinary transfer were altered, (with the exception of an additional provision, granting the appointment of a staff member to aid an illiterate inmate, or one faced with complex issues at a hearing, where all staff members decline him aid). Since *Robbins v. Kleindienst*, 383 F. Supp. 239 (D.D.C. 1974) (dismissed by stipulation, Nov. 27, 1974), the last case challenging the Bureau's disciplinary transfer policy which was ended by the Bureau's adoption of the November 1974 policy statement, the Bureau has not moved to alter their policy. Hence it is doubtful that the Bureau of Prisons will in any way be constricted by the Supreme Court requiring New York to meet the demands of the Fourteenth Amendment, which are already being met by the Bureau.

The Solicitor General further embellished this contradiction by suggesting that only when a transfer is explicitly based on specific infractions of an institution's rules are hearings provided, and then only to determine whether the infraction occurred, not whether the proposed transfer is an appropriate response.[40] He

[40]This statement by the Solicitor General may not be entirely accurate. Bureau of Prisons Policy Statement 7400.5D (9)(D)(6) states that in the case of an emergency transfer, a hearing must be conducted as soon as practicable, "to consider the factual basis of the charge of misconduct *and* the reasons for the emergency transfer." Policy Statement 7400.5D(9) (D) (6) at 14 (July 7, 1975) (emphasis added.) This language implies the Institution Disciplinary Committee will accept argument on the appropriateness of a transfer.

In addition, 7400.5D(10) provides an inmate with a right of appeal from an adverse decision by the Institution Disciplinary Committee. One of three factors that will be considered upon appeal is: "(C) Under the circumstances, was the sanction imposed disproportionate to the offense?"

goes on to say, "[W]e submit this fully comports with the requirements of the Due Process Clause." (Id. at 41) Logically, this implies the Due Process Clause requires hearings, and the Bureau's policy comports with that requirement.

In his brief, the Solicitor General cites *Robbins v. Kleindienst, supra,* as holding a requirement of adversarial hearings "for all transfers, regardless of the reasons they are carried out." (Br. for United States as *amicus curiae*, 31 n. 15) This reading of *Robbins* is erroneous. In that case the Court stated:

> The court has considered only the question of whether the standards enunciated for adjustment and closer custody-type transfers are sufficient. The court has not considered standards for other types of transfers since the named plaintiffs have only suffered from the disciplinary types of transfers and the standards regarding other types of transfers have not been fully addressed by the parties.
>
> 383 F. Supp. at 250, n. 6.

Hence, that case dealt with a transfer similar to that of the respondent. *Robbins* held that hearings are required in disciplinary transfers. The Bureau of Prisons' response to that decision, to their credit, was to comply

and promulgate new policy pertaining to transfer, rather than appeal the District Court's decision. Bureau of Prison Policy Statement 7400.5C, Inmate Discipline, (Nov. 4, 1974) *since superceded by* 7400.5D (July 7, 1975).

Respondent submits that the State of New York would do well to follow the Bureau of Prisons' lead in proposing regulations agreeable to the Due Process Clause. In another post-*Wolff* transfer case involving the Bureau, *Clonce v. Richardson, supra*, the court held that as long as injury resulted, a transfer need not be punitive to require a *Wolff*-type hearing. Although against the interests of the Bureau of Prisons that the Solicitor General posits, the Bureau did not appeal that decision either. Thus, it would seem that the Solicitor General is taking a position contrary to the Bureau of Prisons by advocating denial of due process in disciplinary transfers.

The Solicitor General argues that use of adversarial hearings should be minimized within prisons. He advances two reasons: First, ". . . hearings may hamper the ability of institutions to rehabilitate the inmates," and second, ". . . they may also increase the risk of violence by disappointed inmates." (Br. for United States as *amicus curiae*, 42)[41] In support of his reasons,

[41] The petitioners do not advance either of these arguments, but rather, joined by the State of California, as *amicus curiae*, make the claim of administrative inconvenience and inadequate resources. (Br. for Pet. 10, 18) (Br. for California as *amicus curiae*, 7) The Federal Bureau of Prisons has more institutions and more prisoners than either New York or California and apparently has no difficulty in providing due process hearings in connection with disciplinary hearings.

Furthermore, this Court has not hesitated to require compliance with the Constitution in the face of similar claims. See *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

he argues that inmates' ". . . refusal to accept guilt for wrong doing often is accompanied by a concomitant refusal to accept the legitimacy of the authority of their custodians and a tendency to project into the custodians blame for all events occurring in prison." (Id. at 44) Thus, he reasons, the potential for violence as a means of resolving problems, "could be increased to an unknown degree by the injection of advance notice and formal hearings into major portions of prison administration." (Id. at 44).

This Court, in *Wolff v. McDonnell*, 539 U.S. at 562, acknowledged the existence of these difficulties, but nevertheless rejected them as an absolute bar to providing prisoners with disciplinary hearings. Similarly, the Chief Justice has written that due process is integral to the State's legitimate interest in rehabilitation.

> And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.
>
> —*Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) *(dictum)*.

The Solicitor General relies on an early prison case for his argument. *Sostre v. McGinnis*, 442 F.2d 178, 197 (2d Cir. 1971), cert. den. *sub nom Sostre v. Oswald*, 404 U.S. 1049 (1971). In addition to this Court's later decisions in *Wolff* and *Morrissey*, and the decision of the court below, two other circuit courts have specifically rejected this argument. In weighing the interests of the state against those of the prisoner, the First Circuit said:

> Time has proved, however, that blind deference to correctional officials does no real service to them.

> Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly. (footnote omitted)
>
> – *Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973).

In a case involving disciplinary proceedings at San Quentin, the Ninth Circuit also invoked the traditional balancing test. One factor tipping the scale in favor of due process was the interest of society. In *Clutchette v. Procunier*, 497 F.2d 809 (9th Cir. 1974), the court said:

> The need for conservation of public financial resources is real. However, the interest in savings that can be realized from depriving prisoners of minimum procedural safeguards designed to enhance fair fact finding is outweighed by the larger public interest in rehabilitating offenders and by the individual prisoner's interest in clinging to the remnants of his liberty. The Supreme Court has recognized the linkage between the rehabilitative goals of correctional hearings utilizing nonsummary procedures which are fair and which appear fair to the offender. (footnote and citations omitted.)
>
> –497 F.2d at 816.

The court went on to state:

> As we have earlier pointed out, the rehabilitative goal is improved, not impaired, by imposing procedural protections designed to thwart arbitrariness and to enhance the quality of fact finding. A prisoner who receives what he reasonably views as unfair or arbitrary treatment from prison authorities is likely to become a difficult subject for reformation or even for efficient custody. (citations omitted)
>
> We conclude that, except in emergency situations, the inmate's interest in preserving his slight liberty and his property and the public interest in reaching the rehabilitative ends of corrections outweigh any competing interests that could be promoted by preserving summary proceedings in the conduct of San Quentin's disciplinary hearings.
>
> –497 F.2d at 817.

There can be little doubt that a prison full of people laboring under the kafkaesque apprehension of summary transfer would be counterproductive at best. The notion of unfairness would further embitter the individual transferee. If the state transfers an inmate because of his disruptive effect on the institutions, it would not serve state interests to increase his animosity before placement in a new prison.

The National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, 556 (1973) section on Administrative Justice (§ 16.2) advises expansion of open hearings for just the reasons stated above.

> In many instances, a grievance procedure that has the confidence of the offenders will alleviate the need to utilize more formal and time-consuming methods of testing the appropriateness of correctional decisions. Most correctional institutions do have grievance procedures. Often, they are informal and distrusted by offenders. The close confinement characteristic of most adult prisons

and the regulation of all aspects of the lives of the inmates inevitably will lead to frustrations and grievances – some legitimate, others not. Unattended grievances lead to hostility, as dramatically illustrated at recent uprisings at institutions.

The development of formal grievance, discipline, and change-of-status procedures, while no assurance against further trouble within prisons, at least may alleviate some tensions that otherwise would exacerbate inmate uneasiness. In addition, known procedures operate as a check on the exercise of arbitrary power by institutional staff and keep top management aware of conditions within various facilities and programs.

A recent article, *Procedural Due Process in the Involuntary Institutional Transfer of Prisoners*, 60 Va.L.Rev. 333, 345-46 (1974), includes in a list of deprivations suffered by a transferee, his or her adjustment to new surroundings. The article states that this problem may be further augmented when the inmate was not adequately informed of, nor given a chance to contest, the basis of the transfer decision.

Many recent studies stress the importance of procedural due process in furthering the legitimate rehabilitative function of prisons as well as the anti-rehabilitative effect of the absence of such procedures. A leading corrections authority, David Fogel,[42] has written in an oft-cited treatise:

> The justice model seeks to engage both the keeper and the kept in a joint venture, which would force the agencies of justice to operate in a lawful and just manner. It simply means a belief

[42]Dr. Fogel is presently Director of the Illinois Law Enforcement Commission and former Commissioner of the Minnesota Department of Corrections.

> that the prisoner did not use lawful means outside the prison and should therefore be provided more (not fewer) opportunities to learn lawful behavior in the institution. The efforts of the staff should be geared to teaching a prisoner how to use lawful processes to achieve his ends, as well as to accept responsibility for the consequences of his behavior. In the absence of a continuum of justice in the prison, most ends are reached unlawfully. When unlawful behavior in the prison is detected, the standards of due process that we insist upon outside the prison are not applied. The result is a further indication to the convict that lawful behavior for a convict has little payoff. He can be dealt with arbitrarily and usually responds by treating others in the same manner. The justice model would make sure that the prisoner experienced lawful ways of dealing with problems with the expectation that there would be a carryover to the point of release. The prison experience would try to guarantee that at least for the period of incarceration the prisoner would be exposed to the type of lifestyle that society expects him to pursue when he is released.
>
> –Fogel, *The Justice Model for Social Work in Corrections*, Social Work Practice and Social Justice, 26, 32 (N.A.S.W. 1972).

The National Advisory Commission, *supra*, has clearly pointed to society's interest in the fair treatment of prisoners:

> A major factor in the oppressiveness of correctional institutions and other correctional process is the unchecked power government exercises over individuals committed to its custody. Constitutional standards embodying the principle that government efficiency is not of a higher order than individual freedom have been

flaunted, intentionally or misguidedly. Correctional efforts are undermined if an offender has not been, or does not believe he has been treated fairly and equitably. Hostility is generated against not only the correctional agency but the "system" including the society to which the offender inevitably returns.

—*Corrections*, at 556.

F. The Nature of the Process that is Due

If the Court holds, as we have argued, that the Due Process Clause applies to disciplinary transfers, the question then arises as to what process is due. The answer to the question can be found by looking at the policies of the Federal Bureau of Prisons which affords a federal inmate facing disciplinary transfer the equivalent of a *Wolff* hearing.[43]

Bureau of Prisons' Policy Statement 7400.5D(9)(c) states that "An inmate may not be placed in disciplinary segregation, have his good time withheld or forfeited, *be transferred to another institution for disciplinary reasons* . . ." (emphasis added) without the following procedures. A prisoner has the right to: (1) twenty-four hour written notice of charges; (2) representation by a full-time staff member, including

[43]It is important to note that under Bureau of Prisons' Policy Statement 7400.5D(8), Minor Dispositions, a disciplinary transfer is specifically excluded. Thus the Bureau considers a disciplinary transfer, like segregation and the withholding or forfeiture of good time (both are also excluded in Policy Statement 7400.5D(8)) to be major sanctions reserved for "serious misbehavior." *Wolff v. McDonnell*, 418 U.S. at 571, n. 19.

reasonable time for the staff member to interview the prisoner and prepare his case if necessary; (3) call witnesses and produce documents, if it would not jeopardize institutional security. If the committee declines to call a witness, the committee must document its reasons. If the prisoner waived representation by a staff member, he may submit questions to be put to the requested witness; (4) a (non-verbatim) record of the proceedings that document that the prisoner has been advised of his rights, the committee's findings, the committee's decision, specific evidence relied upon by the committee, a brief statement of the reasons for the sanctions imposed; (5) be present at the hearing, except at the committee's deliberation, and unless institutional security is jeopardized. If the prisoner is excluded, the committee must document their reasons.

The Bureau's policy statement also provides that "an inmate's file shall be expunged of the disciplinary report against him whenever he is found not to have committed a prohibited act (7400.5D(9)(f)) and further provides that a prisoner may appeal the committee's decision to the Warden, the Regional Director of the Bureau and to the Assistant Director of the Bureau (7400.5D(10)).

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed, or alternatively, the Court should decide that certiorari was improvidently granted and the petition should be dismissed.

Respectfully submitted,

ALVIN J. BRONSTEIN
The National Prison Project
of the American Civil Liberties
Union Foundation
1346 Connecticut Avenue, N.W.
Suite 1031
Washington, D. C. 20036
(202) 331-0500

Attorney for the Respondent

Of Counsel:

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th St.
New York, N. Y. 10016

October 15, 1975

APPENDIX 1

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICE

CLINTON CORRECTIONAL FACILITY

TO: COMMISSIONER OF CORRECTIONAL SERVICES
Date December 18, 1973

CLASSIFICATION COMMITTEE EVALUATION OF
INMATE TRANSFER TO:
Attica Correctional Facility
Auburn Correctional Facility
SUBJECT HAYMES, Rodney INST. NO.: CL46112
NYSIIS. NO: 957442J

The Classification Committee has reviewed and evaluated this inmate's case in accordance with the established criteria for selecting inmates for transfer to the correctional facility indicated above, and the following determination was made:

RECOMMENDED For Transfer ____X____
NOT Recommended For Transfer _____

REASON:

Rodney Haymes initial was received at this facility on 6-9-72 from Attica. The transfer was necessitated because of his illicit activities in the law library at that facility. Initially his behavior at this facility was "fair". However, during the past year his behavior has rapidly deteriorated. He has been in Special

Housing Unit #14 for seven consecutive months and has absolutely no inclination to participate in any program available here. He has expressed an interest in a transfer to Attica. If it isn't possible for him to return to Attica, he would like to go to Auburn. At either of these facilities it would be possible for him to receive more visits than at Clinton because his family resides in Buffalo. Perhaps his motivation would thus be increased. He has indicated to his Counselor and in a note to Deputy Superintendent Gard (see attached note from inmate) that he would indeed participate in all the programs available at either of the above facilities. He has been advised by his Counselor that if he is transferred that he will be expected to get involved in a positive manner. Additionally he has been told that failure to participate might result in his prompt return to Clinton.

It is felt that Rodney Haymes could benefit from a fresh start at another facility.

I.Q. 96

Minimum: 7/74; Maximum: 7-27-87; Conditional Release: 7-29-81

/s/ illegible
Correction Counselor

EVALUATION PROMPTED BY:

_____	Inmate letter to Commissioner (letter attached)
X	Inmate request to Institution Officials or Service Unit
_____	Classification Committee Procedure
_____	Other (Specify)

/s/ illegible
Superintendent

DCG-II

APPENDIX 2

STATE OF NEW YORK-DEPARTMENT OF CORRECTIONAL SERVICES

PAROLE BOARD DECISION NOTICE

Name HAYNES, Rodney Date JUL 24 197

Institution DANN 20443

Number

The Board of Parole at the _____ meeting rendered the following decision:

Held to 7/76 Bd with improved record.

APPENDIX 3

3/42

STATE OF NEW YORK-DEPARTMENT OF CORRECTIONAL SERVICES

PAROLE BOARD DECISION NOTICE

Name Rodney Haynes Date JUL 15 1975

Institution Attica Corr. Facility

Number 27739

The Board of Parole at the July 1975 meeting rendered the following decision:

Held 9 mths to improved record

4/76 Bd

Parole Officer